Koperasi Jimat Cermat dan Pinjaman Keretapi Bhd (now known as Koperasi Keretapi Bhd) v Kumar a/l Gurusamy

FEDERAL COURT (PUTRAJAYA) — CIVIL APPLICATION NO 08()–255 OF 2010(W)
ARIFIN ZAKARIA CJ (MALAYA), ZULKEFLI AND JAMES FOONG FCJJ
22 FEBRUARY 2011

Civil Procedure — Jurisdiction — Federal Court — Application for leave to appeal — Respondent's termination from cooperative society — Respondent commenced action in cooperative tribunal — Tribunal found for respondent — Applicant filed appeal to High Court which reversed tribunal's award — Respondent appealed to Court of Appeal which reversed decision of High Court — Preliminary objection — Whether applicant had further right of appeal — Whether Federal Court had jurisdiction to hear appeal — Whether tribunal was subordinate court or inferior court — Whether High Court was exercising its original jurisdiction or appellate jurisdiction when it heard appeal from tribunal

The applicant was at all material times a co-operative society registered under s 4 of the Co-operative Societies Act 1993 ('the Act'), while the respondent was the vice president of the applicant society until his membership was terminated by the applicant. The respondent commenced an action against the applicant in the cooperative tribunal ('the tribunal'), wherein he challenged the validity of his termination. The tribunal found that the decision to terminate the respondent's membership was made in breach of the rules of natural justice and ordered that that the respondent's membership be reinstated. The applicant filed an appeal to the High Court. The High Court allowed the applicant's appeal and set aside the whole award made by the tribunal with costs. When the respondent appealed against that decision, the Court of Appeal allowed the respondent's appeal. This was the applicant's application for leave ('leave application') to appeal to the Federal Court against the decision of the Court of Appeal. The respondent in turn raised the preliminary objection to strike out the leave application. The preliminary objection concerned the issue as to whether in hearing the appeal from the tribunal, the High Court was exercising its original jurisdiction or its appellate jurisdiction. This was crucial to the case because if the High Court was exercising its appellate jurisdiction, the matter should have ended in the Court of Appeal and the Federal Court would not have the jurisdiction to hear the application. The applicant contended that since the tribunal was not a court and could not be regarded as a subordinate court, the decision of the High Court in this case was made in the exercise of its original jurisdiction and thus appealable to the Federal Court. The respondent submitted that by the scheme of the Act, the tribunal was indeed an 'inferior

court' and that the applicant by invoking s 83(7) of the Act had proceeded by way of an appeal against the decision of the tribunal to the High Court and not by way of judicial review. As such the respondent contended that the High Court was exercising its appellate jurisdiction and the matter should end at the Court of Appeal.

Held, allowing the preliminary objection and striking out the leave application with costs:

(1) The fact as to whether the tribunal is a subordinate court or an inferior court was not in issue. The critical issue was whether the High Court was exercising its original or appellate jurisdiction (see para 16).

(2) In the present case, the applicant's appeal to the High Court was made pursuant to s 83(7) of the Act and by invoking O 55 r 13 of the Rules of the High Court 1980. Hence the matter came before the High Court by way of an appeal. It follows therefore that the decision of the High Court did not arise from the exercise of its original jurisdiction and thus did not fall within the ambit of s 96(a) of the Courts of Judicature Act 1964 (see para 17).

[Bahasa Malaysia summary

Pemohon pada setiap masa material adalah koperasi berdaftar di bawah s 4 Akta Koperasi 1993 ('Akta'), manakala responden merupakan naib presiden pemohon sehinggalah keahliannya ditamatkan oleh pemohon. Responden memulakan tindakan terhadap pemohon dalam tribunal koperasi ('tribunal'), di mana dia mempertikaikan kesahan penamatannya. Tribunal mendapati bahawa keputusan untuk menamatkan keahlian responden dibuat melanggar peraturan keadilan semula jadi dan memerintahkan bahawa keahlian responden dimasukkan semula. Pemohon memfailkan rayuan ke Mahkamah Tinggi. Mahkamah Tinggi membenarkan rayuan pemohon dan mengenepikan keseluruhan award yang dibuat tribunal dengan kos. Apabila responden merayu terhadap keputusan itu, Mahkamah Rayuan membenarkan rayuan responden. Ini merupakan permohonan pemohon untuk keizinan ('permohonan keizinan') untuk merayu ke Mahkamah Persekutuan terhadap keputusan Mahkamah Rayuan. Responden kemudiannya membangkitkan bantahan awalan untuk membatalkan permohonan keizinan tersebut. Bantahan awalan adalah berkenaan isu sama ada dalam pendengaran rayuan daripada tribunal, Mahkamah Tinggi melaksanakan bidang kuasa sedia adanya atau bidang kuasa rayuannya. Ini amatlah penting kepada kes ini disebabkan jika Mahkamah Tinggi melaksanakan bidang kuasa rayuannya, perkara itu harus berakhir di Mahkamah Rayuan dan Mahkamah Persekutuan tidak harus mempunyai bidang kuasa untuk mendengar permohon tersebut. Pemohon berhujah bahawa memandangkan tribunal bukanlah mahkamah dan tidak boleh dianggap sebagai mahkamah rendah, keputusan Mahkamah Tinggi dalam kes ini dibuat dalam melaksanakan bidang kuasa sedia adanya dan oleh

itu boleh dirayu ke Mahkamah Persekutuan. Responden berhujah bahawa menerusi aturan Akta tersebut, tribunal tersebut sesungguhnya merupakan 'inferior court' dan bahawa pemohon, dengan mengguna pakai s 83(7) Akta telah meneruskan dengan rayuan terhadap keputusan tribunal ke Mahkamah Tinggi dan bukannya dengan semakan kehakiman. Oleh itu, responden berhujah bahawa Mahkamah Tinggi melaksanakan bidang kuasa rayuannya dan perkara itu sepatutnya berakhir di Mahkamah Rayuan.

Diputuskan, membenarkan bantahan awalan dan membatalkan permohonan keizinan dengan kos:

(1) Fakta bahawa sama ada tribunal merupakan mahkamah rendah atau mahkamah bawahan bukanlah isunya. Isu kritikal adalah sama ada Mahkamah Tinggi melaksanakan bidang kuasa sedia ada atau bidang kuasa rayuannya (lihat perenggan 16).

(2) Dalam kes ini, rayuan pemohon ke Mahkamah Tinggi dibuat berikutan s 83(7) Akta dan dengan mengguna pakai A 55 k 13 Kaedah-Kaedah Mahkamah Tinggi 1980. Maka, perkara ini dihadapkan ke Mahkamah Tinggi menerusi suatu rayuan. Oleh itu, keputusan Mahkamah Tinggi tidak berbangkit daripada pelaksanaan bidang kuasa sedia adanya dan oleh itu tidak terangkum dalam bidang s 96(a) Akta Mahkamah Kehakiman 1964 (lihat perenggan 17).]

Notes

For cases on Federal Court, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4897–4906.

Cases referred to

Auto Dunia Sdn Bhd v Wong Sai Fatt & Ors [1995] 2 MLJ 549, FC (refd)

Healey v Ministry of Health [1954] 3 All ER 449, CA (refd)

Ketua Pengarah Hasil Dalam Negeri v Syarikat Jasa Bumi (Woods) Sdn Bhd (Civil Application No 08–31 of 1999(S)), FC (refd)

Pahang South Union Omnibus Co Bhd v Minister of Labour and Manpower & Anor [1981] 2 MLJ 199; [1981] CLJ 74, FC (refd)

Terengganu Forest Products Sdn Bhd v Cosco Container Lines Co Ltd & Anor and other applications [2011] 1 MLJ 25; [2011] 1 CLJ 51, FC (refd)

Legislation referred to

Co-operative Societies Act 1993 ss 4, 83, 83(1), (5), (7)
Courts of Judicature Act 1964 s 96(a)
Federal Constitution art 128(3)
Income Tax Act 1967
Rules of the High Court 1980 O 53, O 55, O 55 r 13
Subordinate Courts Act 1948 s 3

Appeal from: Civil Appeal No W-02–772 of 2009 (Court of Appeal, Putrajaya)

K Shanmugan (Kanesalingam & Co) for the applicant.
N Chandran (Ranjan Chandran with him) (Ranjan Chitravathy & Nik) for the respondent.

Arifin Zakaria CJ (Malaya) (delivering judgment of the court):

INTRODUCTION

[1] There are two applications before us namely: encls 2(a) and 5(a). These applications were fixed for hearing on 29 November 2010. Enclosure 2(a) is an application for leave to appeal to this court against the decision of the Court of Appeal, while encl 5(a) is a preliminary objection by the respondent to strike out the application in encl 2(a).

[2] In this judgment we shall deal with the preliminary objection raised herein. For this purpose, we shall briefly state the facts and the circumstances leading to the application in encl 5(a). The applicant, at all material time, is the cooperative society registered under s 4 of the Co-operative Societies Act 1993 ('the CSA'). The respondent was the vice president of the cooperative society until his membership was terminated by the applicant. He commenced action against the applicant in the cooperative tribunal, established under s 83(1) of the CSA ('the tribunal'), challenging the validity of his termination. The tribunal found that the termination of his membership was made in breach of the rule of natural justice and ordered that the respondent's membership be reinstated. Aggrieved, the applicant filed an appeal against the award of the tribunal to the High Court. The High Court, had on 2 April 2009, allowed the applicant's appeal and set aside the whole award of the tribunal made on 17 May 2004 with costs. The respondent then appealed to the Court of Appeal. The Court of Appeal, had on 8 July 2010, unanimously allowed the respondent's appeal. Hence, this application in encl 2(a) for leave to appeal was made to this court.

ENCLOSURE 5(A)

[3] The preliminary objection raises the issue of whether in an appeal from the tribunal under the CSA, the High Court, was exercising its original jurisdiction or its appellate jurisdiction. This is crucial to the case because if the High Court was exercising its appellate jurisdiction, the matter should end in the Court of Appeal and this court does not have the jurisdiction to hear the application in encl 2(a). This calls into consideration as to how a right of appeal

A arises in the present case.

RIGHT OF APPEAL

B **[4]** Generally, a right of appeal is conferred by statute. It is a creature of statute. The case of *Auto Dunia Sdn Bhd v Wong Sai Fatt & Ors* [1995] 2 MLJ 549 at p 553 (FC) is the authority for this proposition. In that case, Edgar Joseph Jr FCJ stated that:

C > It is elementary proposition that this court is a creature of statute and that equally a right of appeal is also a creature of statute, so that unless an aggrieved party can bring himself within the terms of a statutory provision enabling him to appeal, no appeal lies.

(see also *Pahang South Union Omnibus Co Bhd v Minister of Labour and Manpower & Anor* [1981] 2 MLJ 199; [1981] CLJ 74).

D **[5]** Similarly, in *Healey v Ministry of Health* [1954] 3 All ER 449 at p 453 (CA), Morris LJ stated that:

E > There can certainly be no implication of a right of appeal. Had it been desired to provide some machinery or procedure for an appeal from the decision of the Minister, it could have been done. Any such prescribed appeal might or might not have been an appeal to the courts. Questions as to which methods for determining rights are the most desirable raise issues of policy which are for Parliament to decide; but the court cannot invent a right of appeal where none is given. The courts will not
F > usurp an appellate jurisdiction where none is created.

[6] The jurisdiction of the Federal Court to determine appeals is governed by art 128(3) of the Federal Constitution, which reads:

G > 128 Jurisdiction of Federal Court
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> (3) The jurisdiction of the Federal Court to determine appeals from the Court of Appeal, a High Court or a judge thereof shall be such as may be provided by federal law.

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[7] In civil matter, this is governed by s 96(a) of the CJA, which reads:

> 96 Conditions of appeal
>
I > Subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal, an appeal shall lie from the Court of Appeal to the Federal Court with the leave of the Federal Court —

(a) from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction; involving a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage; or

(b) from any decision as to the effect of any provision of the Constitution including the validity of any written law relating to any such provision.

[8] In the recent case of *Terengganu Forest Products Sdn Bhd v Cosco Container Lines Co Ltd & Anor and other applications* [2011] 1 MLJ 25; [2011] 1 CLJ 51, Zaki Tun Azmi Chief Justice in applying s 96(a) of the CJA ruled that:

> *It is also clear from the section that the cause or matter must have been decided by the High Court in its original jurisdiction*. The legal issue posed to this court may have arisen from the decision of the High Court in the exercise of its original jurisdiction or in the Court of Appeal in the course of its giving its judgment or making its order under the first limb and must be questions of general principles. (Emphasis added.)

[9] It follows, therefore, that if the decision of the High Court does not arise from the exercise of its original jurisdiction, it will not fall within the ambit of s 96(a) of the CJA. In this regard, we would refer to the unreported decision of this court in *Ketua Pengarah Hasil Dalam Negeri v Syarikat Jasa Bumi (Woods) Sdn Bhd* (Civil Application No 08–31 of 1999(S)). In that case, the issue was whether the High Court in making a decision on a case stated by the Special Commissioners of Income Tax to the High Court was exercising its appellate jurisdiction as opposed to its original jurisdiction. It was argued for the respondents that s 96(a) of the CJA could not be invoked and the decision of the High Court in this regard was not appealable to the Federal Court. Learned counsel for the applicant contended that the Special Commissioners of Income Tax in deciding on appeal from the decision of the Director General of Inland Revenue was not a subordinate court or an inferior court, and that in making decision on matters appealed from the special commissioners of income tax, the High Court was in fact exercising its original jurisdiction and not its appellate jurisdiction.

[10] Chong Siew Fai CJSS, in delivering judgment of the court in that case stated:

> It is significant to note that in line with the provisions of s 96(a) of the Courts of Judicature Act 1964, the judgment sought to appeal against in our present case is the judgment of the Court of Appeal and not that of the High Court. That being the case, the pertinent question to consider is not so much as to whether the special commissioners constituted a subordinate court or an inferior court but rather whether the judgment of the Court of Appeal sought to appeal against is in respect

A of a cause or matter decided by the High Court in the exercise of its original jurisdiction. In other words, the material point is not so much the status of the Special Commissioners sitting in judgment of the assessment made by the Director General, but rather the nature of the jurisdiction exercised by the High Court when it heard an appeal from the decision of the Special Commissioners by way of case stated.

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[11] After having considered art 128(3) of the Federal Constitution, s 96(a) of the CJA and the relevant provision of the Income Tax Act 1967, the Federal Court came to the conclusion that the decision of the High Court was made in the exercise of its appellate jurisdiction and as such it does not come within the ambit of s 96(a) of the CJA and, therefore, the decision of the Court of Appeal respecting which leave was sought is not appealable to the Federal Court.

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[12] In the present case, learned counsel for the applicant contended that the tribunal is not a court. He relied on s 3 of the Subordinate Courts Act 1948 ('the SCA'), which reads:

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3 Courts

(2) There shall be established the following Subordinate Courts for the administration of civil and criminal law —

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(a) Sessions Courts;

(b) Magistrates' Courts; and

(c) In West Malaysia only, Penghulu's Courts.

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[13] He further submitted that the tribunal is also not regarded as 'subordinate court' under the CJA, s 3 of which provides:

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'subordinate court' means any inferior court from the decisions of which by reason of any written law there is a right of appeal to the High Court and means in relation to the High Court any such court as by any written law has jurisdiction within the local jurisdiction of the High Court.

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[14] Since the tribunal is not an inferior court, counsel for the applicant contended that the decision of the High Court in this case was made in the exercise of its original jurisdiction and, therefore, it is appealable to the Federal Court.

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[15] In response, counsel for the respondent submitted that the tribunal was established pursuant to s 83 of the CSA and its powers are clearly set out in

s 83(5) of the CSA. He also contended that, the chairman of the tribunal is required to be a member of the judicial and legal service. On that premise, he submitted that by the scheme of the CSA, the tribunal is indeed an 'inferior court'. More importantly, he submitted that the applicant itself, in invoking s 83(7) of the CSA, has proceeded by way of appeal under O 55 of the Rules of the High Court 1980 ('the RHC') and not by way of the judicial review under O 53 of the RHC.

[16] Having considered the arguments of parties, we are of the opinion that whether the cooperative tribunal is a subordinate or an inferior court is not in issue. The critical issue is whether the High Court was exercising its original or appellate jurisdiction.

[17] In the present case, the appeal by the applicant to the High Court was made pursuant to the provision of s 83(7) of the CSA which states:

> Section 83 Tribunal
>
> (7) Any party aggrieved by the award of a tribunal may appeal therefrom to the High Court in accordance with the provisions of the rules of court applicable thereto.

The appeal was instituted by the applicant, by way of originating motion, pursuant to O 55 r 13 of the RHC, which reads:

> O 55 r 13 Appeal from person or body of persons
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> (1) Where under any written law an appeal lies from any decision of any person or body of person to the High Court such appeal shall be made to the High Court in the State where the decision was given by motion setting out the grounds of appeal, supported by affidavit and, if the Court so directs at the hearing, by oral evidence.
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> (2) Unless otherwise provided by any written law, such appeal shall be made within one month from the date on which the decision was given or the date on which such decision was notified to the person appealing, whichever is the later date.
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> (3) Unless otherwise provided by any written law, notice of the motion shall be served on the respondent in such appeal or where the respondent is a body of person, on the secretary, registrar or such other officer of that body of persons.

Hence, the matter came before the High Court by way of an appeal. It follows, therefore, that this application could not come within the ambit of s 96(a) of the CJA.

CONCLUSION

[18] For the above reasons, we uphold the preliminary objection raised

herein and accordingly the application in encl 2(a) is struck out with costs. We now invite parties to address us on the amount of costs to be awarded to the respondent.

Preliminary objection allowed and leave application struck out with costs.

Reported by Kohila Nesan